Filed 7/29/19 CDFT Limited Partnership v. DKN Holdings, LLC CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CDFT LIMITED PARTNERSHIP et al., Plaintiffs, Cross-defendants and Appellants, v. DKN HOLDINGS, LLC, Defendant, Cross-complainant and Appellant; PATRICIA DENDY, Individually and as Executor, etc. et al., Cross-defendants and Appellants.	E067583 (Super.Ct.No. RIC505371) OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge. Dismissed.

Stream Kim Hicks Wrage & Alfaro, Eugene Kim, and Robert J. Hicks for Plaintiffs, Cross-Defendants and Appellants and for Cross-Defendants and Appellants.

Prenovost, Normandin, Bergh & Dawe, Michael G. Dawe, and Nichole M. Wong for Defendant, Cross-Complainant and Appellant.

Don Norris and Bill Dendy were friends and business associates. They respected and trusted each other. Dendy was a real estate broker with considerable real estate development experience; Norris owned well-located but undeveloped property in Murrieta. Thus, they agreed that Norris would give Dendy a half-interest in the property, in exchange for Dendy's labor and expertise in developing it.

This original agreement was oral and informal. The parties then modified it several times, again, orally and informally. Unfortunately, while the development was still on-going, Dendy died.

Norris and Dendy's successors disagreed vehemently over what each side was obligated to do. To their credit, they did manage to cooperate sufficiently to complete the development.

In this action, both sides sought an accounting as to who owed whom how much for what. In a process that began with a complaint in 2008 and ended with a judgment in 2016, they eventually received that accounting.

Neither side was satisfied. Both sides appealed. After this court issued its tentative opinion and set oral argument (see Ct. App., Fourth Dist., Div. Two, Internal Operating Practices & Proc., VIII, Tentative opinions and oral argument), however, the parties notified us that they had settled and requested dismissal of their appeals. Although we will grant the request for dismissal, in light of the tardiness of the request (see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 5:64, pp. 5-29–5-30) and the minimal merit of the appeals, we will also express our views on the issues in this opinion. (*Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065-1066.)

I

THE PARTIES

The sole defendant is DKN Holdings, LLC.[1] We will refer to it as the "Norris Company." In general, at all relevant times, Norris was acting on behalf of the Norris Company.

One of the plaintiffs is CDFT Limited Partnership.[2] We will refer to it as the "Dendy Company." In general, at all relevant times Dendy, was acting on behalf of the Dendy Company.

Because of the unity of interest between Dendy and the Dendy Company, on the one hand, and between Norris and the Norris Company, on the other hand, we will not be very fussy about the distinction between each man and his company.

The other plaintiff is Margarita Ville, LLC, which Dendy formed to carry out part of the development. We will refer to it as the "LLC." Dendy was the managing member

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1 DKN apparently stands for "Don and Karen Norris," the sole owners.

2 "CDFT" stands for "Can Do Family Trust."

of the LLC. The Dendy Company and the Norris Company each owned 10 percent of the LLC; the other 80 percent was owned by other investors.

The Norris Company cross-complained against the Dendy Company, the LLC, and five other cross-defendants, all affiliated with Dendy.[3] We will refer to cross-defendants collectively as the "Dendy Parties."

Cross-defendant Dendy Real Estate & Investment Co. was Dendy's real estate brokerage and development business; it was also the general partner in the Dendy Company. We will refer to it as Dendy Real Estate.

Cross-defendant Patricia Dendy is Dendy's widow.[4] She took over his business interests after his death.

Cross-defendant Kelli Jones was a real estate agent with Dendy Real Estate. She was also co-manager of the LLC until April 2006, when she left and Mrs. Dendy succeeded her.

Cross-defendant James Roick is Dendy's son-in-law. After Dendy died, he replaced Dendy as broker of record at Dendy Real Estate and, more generally, he helped Mrs. Dendy.

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3 Initially, Don Norris and Karen Norris were also named as cross-defendants. Eventually, however, they were voluntarily dismissed without prejudice.

4 Mrs. Dendy is deceased. Her daughter, Tami Roick was substituted for her on appeal as her successor in interest.

Cross-defendant Dr. Thomas G. Williams was the single largest investor in the LLC.[5]

II

STATEMENT OF FACTS

Unless otherwise noted, all facts stated in this opinion are taken from Phase I and Phase II of the trial (see part III, *post*), because those were the only phases that related to the rulings challenged on appeal.

For now, we focus on general background facts, plus facts relevant to the Norris Company's disputed obligation to pay for infrastructure improvements. (See part V, *post*.) We will state additional facts later, as they become relevant.

A. *Norris and Dendy Enter into an Oral Agreement*.

Norris and Dendy had known each other since first grade. In 1995 or 1996, they began doing business together. They were good friends; they trusted each other.

Norris owned two adjacent pieces of property in Murrieta, each a little over 13 acres. "Margarita Ville" was on the west side of Margarita Road, and "Margarita Square" was on the east side of Margarita Road.

On or before November 8, 1999, Dendy and Norris entered into an oral agreement. We will refer to it as the "Original Agreement." Its key terms were that:

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[5] There was conflicting evidence as to whether Dr. Williams was a "manager" of the LLC or only an investor. The issue is not material to this appeal; however, if it were, the substantial evidence rule would require us to accept, in support of the judgment, that he was not a manager. (See part V.A, *post*.)

1. Norris would deed a half-interest in both properties to Dendy.

2. Margarita Ville would be subdivided and then sold.

3. Margarita Square would be entitled as a shopping center and then sold in one piece.

4. Dendy would take the laboring oar in developing the properties.

5. Dendy would not receive any broker's commissions.

6. Norris and Dendy would split profits and expenses 50-50.

We will refer to the resulting business as "Dendy-Norris."[6]

The Norris Company duly deeded a half-interest in the properties to the Dendy Company.

B. *Margarita Ville Is Subdivided and Most Parcels Are Sold*.

Later, Norris and Dendy modified their agreement. They agreed to build out Margarita Square as a shopping center; Margarita Ville would still be subdivided and sold, but the proceeds would be used to fund the development of Margarita Square.

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6 The Norris Company characterizes Dendy-Norris as a joint venture rather than a partnership. The distinction is not material to this appeal. "The incidents of a joint venture are in all important respects the same as those of a partnership. [Citation.]" (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091.) In particular, both "partners [and] joint venturers have a fiduciary duty to act with the highest good faith towards each other regarding affairs of the partnership or joint venture. [Citations.]" (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524-525.) Also, "joint venturers[] and partners[] are jointly and severally liable to third parties for the obligations of the joint venture or partnership [citation] . . . ." (*Victor Valley Transit Authority v. Workers' Compensation Appeals Bd.* (2000) 83 Cal.App.4th 1068, 1076, italics omitted.)

Margarita Ville was, in fact, subdivided into nine parcels. However, parcels 7, 8, and 9 were later recombined into a single parcel numbered 7; it totaled 5.41 acres, making it the single largest parcel. We will refer to this as the "Glenwood" parcel (because it was eventually sold to an entity named Glenwood), and we will refer to parcels 1-6 as the "outparcels."

Sometime in 2003, the city issued conditions of approval for the tentative parcel map for Margarita Ville.[7] These required the subdivider (i.e., Dendy-Norris) to install certain infrastructure improvements for the benefit of all of the parcels, including a road, utilities running under the road, water systems, and landscaping.

Between 2003 and 2005, all of the outparcels were sold.[8]

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7 The timing of the conditions is a little mysterious. In August 2003, city staff recommended approval of the conditions. In October 2003, a prospective buyer made an offer to purchase one parcel; the offer described it with reference to the subdivision map number. We conclude that the conditions were approved sometime between August and October 2003.

The content of the conditions is likewise mysterious. The 2003 conditions themselves are not in the record. However, the record does contain the conditions of approval for the subsequent tentative map that combined parcels 7, 8 and 9 into a single parcel, in October 2004. They did not name the "applicant," but there was testimony that it was the Norris Company and the Dendy Company. The Dendy Company cites these as "the" conditions of approval. The Norris Company does not take issue with this. We conclude that the conditions of approval imposed earlier, in 2003, were substantially similar.

8 Specifically:

October 20, 2003: Agreement to sell parcel 6 to North Island Financial Credit Union; sale closed March 31, 2005.

C. *The LLC Is Formed*.

Dendy came up with a plan to develop the Glenwood parcel instead of selling it. He would form the LLC and convey the Glenwood parcel to it. The LLC would then build it out as a shopping center and would lease out the spaces.

According to Norris, Dendy repeatedly told him that their estimated obligation to pay for infrastructure improvements, under their contracts with purchasers of the outparcels, was $400,000, so they should each budget $200,000 for this purpose.[9]

Dendy explained that, once the LLC was formed, it would become the "master developer," and it would pay for the bulk of the infrastructure improvements. Moreover, Dendy would create a landowners' association, which would require the purchasers of the

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[footnote continued from previous page]

October 21, 2003: Agreement to sell parcel 5 to the Reguses and the McCoys; sale closed May 14, 2004.

March 15, 2004: Agreement to sell parcel 4 to Ahn; sale closed July 30, 2004.

October 27, 2004: Agreement to sell parcel 3 to Malool and Mirshafiee; sale closed February 4, 2005.

December 3, 2004: Agreement to sell parcel 1 to Cliff Kun Woo, LLC; sale closed June 23, 2005.

January 24, 2005: Agreement to sell parcel 2 to Wilshire Group Funding; sale closed March 31, 2005.

Parenthetically, as an expert witness noted at trial, the supporting documentation sometimes refers to the same parcels by different numbers. We use the parcel numbers as shown in an exhibit that retrospectively summarized the sales.

[9] This did not include a traffic signal and a bridge, which were the subject of separate agreements.

outparcels to "chip in" for some of the infrastructure improvements. For example, the purchasers (with one exception) would have to pay for "putting in the road in front of their individual parcels . . . .

By contrast, according to Dr. Williams, before he invested in the LLC, Dendy told him that Dendy-Norris "would cover all of the infrastructure costs." Dendy showed him return-on-investment calculations, which assumed that "the only cost to [the LLC] was the . . . building costs."

On April 14, 2004, the LLC was formed.

Meanwhile, on April 9, 2004, the Norris Company and the Dendy Company entered into an agreement to sell the Glenwood parcel to the LLC. The purchase price was $4 million — $3 million in cash, plus $1 million in shares of the LLC. The sale closed on March 10, 2005.

Norris testified that when he agreed to sell the Glenwood parcel to the LLC, he relied on Dendy's promise that his (Norris's) obligation to fund infrastructure improvements was limited to $200,000.

Dendy obtained bids for all infrastructure improvements for Margarita Ville; they totaled not $400,000, but $2.2 million.

D. *Dendy's Death and Its Aftermath*.

On May 15, 2005, Dendy died suddenly.

Dendy had also been working on other real estate development projects. In September 2005, an entity called Glenwood[10] sent letters of intent proposing to buy four of his projects for a total of $35 million. One of these was the Glenwood parcel, for which Glenwood proposed to pay $7.4 million.

On September 27, 2005, Norris attended a meeting with Mrs. Dendy, Kelli Jones, and Dendy's son Greg Dendy. Witnesses gave different accounts of this meeting.

According to Kelli Jones, at that meeting, Norris "said he would pay for [the infrastructure improvements]." He also agreed to have his share of the proceeds of the sale to Glenwood placed in an "holdback" escrow account, to be used exclusively for the infrastructure improvements.

According to Greg Dendy, however, when Norris was asked if he would pay for the infrastructure improvements, he responded only by demanding updated bids for them.

According to Norris himself, he insisted that the Norris Company was not obligated to pay for infrastructure improvements, and there was no discussion of a holdback account.

On November 11, 2005, Glenwood signed a formal offer to purchase. It required the LLC to complete certain specified infrastructure improvements after close of

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[10] Apparently "Glenwood" was a d/b/a name of GFG Properties, Inc.

escrow.[11] It further provided that $2.2 million of the sale proceeds would be placed in a holdback account for this purpose.

On November 14, 2005, Norris attended another meeting with Mrs. Dendy, Kelli Jones, and Greg Dendy, as well as representatives of Glenwood. Once again, witnesses gave different accounts of this meeting.

According to Kelli Jones, she asked Norris if he was going to pay for the infrastructure improvements, and he said yes. She also asked if he agreed to the holdback account, and he said yes.

According to Mrs. Dendy, when asked about the infrastructure improvements, Norris "told Glenwood to put some of its money in escrow and they'd talk about it." The holdback account was not discussed.

Similarly, according to Greg Dendy, Norris answered, "[I]f they put up some earnest money, we would go from there."

According to Norris, however, he said only that "the Norris Company would pay for whatever it was obligated to do." And, once again, he denied that there was any discussion of a holdback account.

On November 15, 2005, purportedly in reliance on Norris's statements at these meetings, the LLC accepted and signed Glenwood's offer.

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11 These included utilities, fire hydrants, street widening, a road median, driveways, landscaping, and parking lots. In general, they were to be installed off-site — i.e., not on the Glenwood parcel itself, and sometimes not on Margarita Ville at all.

In January 2006, escrow closed on the sale to Glenwood. Sometime before then, however, Norris refused to contribute to the holdback account.

The Norris Company's half of the proceeds totaled $654,248. Rather than disburse this to the Norris Company, the LLC placed it in the holdback account. The Dendy Company put in its own $1.1 million share of the holdback account, and to make up the remainder of the Norris Company's share, it put in another $445,752.

At the time, Norris explained that he refused to fund the holdback account because the Dendy Company had refused to repay certain advances that he had made to Dendy. (See part VII, *post*.) At trial, however, he explained that it was because his half of the sale proceeds had been put into the holdback account without his permission.

Jason Michael, Mrs. Dendy's grandson, was interfacing with Norris on her behalf. He called Norris's claim that his liability for infrastructure improvements was limited to $200,000 "ridiculous," because Norris conceded that he had agreed to pay for utilities, grading, and other things that could not possibly be done for only $400,000.

III

PROCEDURAL BACKGROUND

The Dendy Company's and the LLC's operative complaint asserted causes of action for breach of contract, breach of fiduciary duty, promissory estoppel, an accounting, and declaratory relief.

The Norris Company's operative cross-complaint asserted causes of action for breach of contract, breach of fiduciary duty, an accounting, indemnity, conversion, and declaratory relief.

The case was tried to the court, in four phases. There was no written bifurcation order; the scope of each phase must be gleaned from discussions in the reporter's transcript.

Phase I was held from January 31-February 11, 2013. The intended scope of Phase I is not entirely clear; however, the primary issue was whether the Norris Company's claims for money loaned to Dendy were barred by the statute of limitations. The trial court ruled that the statute of limitations had not run.

Phase II was held from February 11-21, 2013. It concerned the Norris Company's liability for infrastructure improvement costs. The trial court ruled that the Norris Company and the Dendy Company were equally responsible for infrastructure improvement costs.

Thereafter, on September 13, 2013, the court issued a partial statement of decision relating to Phase I and Phase II, in which it ruled further that (1) the Norris Company's claim for repayment of a $125,000 loan to Dendy was not barred by the statute of limitations, and (2) the Dendy Company was liable for the $125,000 loan to Dendy because it was Dendy's alter ego.

Meanwhile, Phase III was held from March 18-20, 2013. It concerned issues relating to Margarita Square.

On March 28, May 14-15, and May 23, 2013, the trial court heard closing arguments. In the interim, on April 29, 2013, it appointed an accountant as referee for the accounting. On October 8, 2015, the accountant filed his report.

Phase IV was held on October 26-29, November 2, and November 17-18, 2015, and February 26, 2016. It concerned the Norris Company's objections to the accountant's report.

On August 12, 2016, the trial court issued its final statement of decision. On December 30, 2016, it entered judgment.

It netted out all amounts owed to arrive at total awards (1) in favor of the Norris Company and against the Dendy Company, (2) in favor of the LLC against the Norris Company, and (3) in favor of the Dendy Company against the LLC. On the cross-complaint, it found against the Norris Company and in favor of all of the Dendy Parties.

The Norris Company filed a timely appeal from the judgment. The Dendy Parties filed a timely cross-appeal.

IV

THE ISSUES

In its appeal, the Norris Company contends:

1. The Norris Company should not have been required to pay any more than $200,000 toward infrastructure improvements.

2. The Norris Company should have been allowed to amend its cross-complaint.

3. The Norris Company should have been awarded interest on $579,067 in advances that it made to the Dendy Company.

4. The Norris Company should have been allowed to prove that the Dendy Parties were liable for its litigation expenses under the "tort of another" doctrine.

5. The Dendy Company should have been held liable for all damages caused by Dendy's failure to account.

In their cross-appeal, the Dendy Parties contend:

1. The Dendy Company should not have been required to repay the real estate commissions that the Norris Company paid to Dendy Real Estate.

2. The Dendy Company should not have been held liable to the Norris Company for the $125,000 loan, because:

a. The statute of limitations had run.

b. The lender was Norris, not the Norris Company.

c. The borrower was Dendy, not the Dendy Company.

V

INFRASTRUCTURE IMPROVEMENTS

The trial court ruled that the Norris Company owed the Dendy Company $466,739 and owed the LLC $445,752 as its unpaid half-share of infrastructure improvement costs.[12]

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[12] It also found that the Norris Company owed additional amounts for the bridge. The Norris Company does not challenge this finding.

The Norris Company contends that it was only liable for $200,000 toward infrastructure improvements; thus, the trial court erred by holding it liable for half of the infrastructure improvements, and moreover, the Dendy Parties committed a breach of contract, as well as a breach of fiduciary duty, by trying to hold it liable for half of the infrastructure improvements.

A. *Standard of Review*.

The Norris Company asserts: "The standard of review is *de novo* because the material facts are uncontested."

But the material facts are by no means uncontested. Admittedly, Norris testified that Dendy promised that his liability for infrastructure improvements would be limited to $200,000. If so, no one else was in the room at the time, and Dendy is dead; thus, there were no eyewitnesses who could directly contradict Norris's testimony. As we will discuss, however, it was contradicted by circumstantial evidence, and there was evidence that Norris even contradicted it himself.

To look at it another way, if the uncontradicted facts *did* require a finding in favor of the Norris Company, there could be no harm in us reviewing *all* of the relevant evidence.

Accordingly, the substantial evidence standard of review applies. "'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' [Citation.]" (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

B. *Forfeiture*.

Precisely because the standard of review is substantial evidence, the Norris Company has forfeited this contention by failing to set forth the relevant evidence in full.

"'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] Defendant['s] contention herein 'requires defendant[] to demonstrate that there is *no* substantial evidence to support the challenged findings.' [Citations.] A recitation of only defendant['s] evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as defendant[] here contend[s], 'some particular issue of fact is not sustained, [it is] required to set forth in [its] brief *all* the material evidence on the point *and not merely* [*its*] *own evidence*. Unless this is done the error assigned is deemed to be waived.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881-882.)

We turn now to the merits, but only as separate and alternative grounds for the same result.

C. *The Merits*.

1. *Substantial evidence supports the trial court's finding*.

The only evidence that Dendy made the asserted promise came out of Norris's mouth at trial. "As a general rule, '[provided] the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]' [Citation.]" (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 890.)

The trial court could reasonably disbelieve Norris, for four reasons.

First, when the promise was supposedly made, both the Norris Company and the Dendy Company were already obligated to build the infrastructure improvements.

They were obligated to do so under the conditions of approval. This was not merely a precondition for the issuance of a building permit; it was a contractual obligation, under section 16.108.010 of the Murrieta Municipal Code, which provides that "[t]he subdivider, as a condition of approval of a final or parcel map, shall improve, or agree and guarantee to improve, all land either within or outside the subdivision, in compliance with the final or parcel map . . . ."

They were also obligated to do so under the terms of the then-existing purchase agreements for the outparcels. At the time, the sales of two (or perhaps three) of the outparcels were pending.[13] The purchase agreement for parcel 6 required Dendy-Norris

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13 In October 2003, Dendy-Norris accepted offers to purchase parcel 5 and parcel 6; in March 2004, it accepted an offer to purchase parcel 4. (See fn. 7, *ante*.)

to deliver a graded and "fully completed" pad and to "complet[e] all site work on the balance of the property, . . . in a condition ready for construction . . . ." Norris signed this purchase agreement.

The purchase agreement for parcel 5 similarly required Dendy-Norris to deliver "fully completed (finished) parcels ready for construction" and to "complet[e] all site work on the balance of the property, . . . in a condition ready for construction." Again, Norris signed this purchase agreement.[14]

Norris testified that he reviewed the purchase agreements, with particular attention to "what we were required to do." Presumably he was well aware of this.[15]

[footnote continued from previous page]

Norris testified that Dendy made his supposed promise sometime after he proposed to form the LLC, but before he actually formed it. This would have had to be after December 2003, when the Glenwood parcel went into escrow in a deal that later fell through. It would also have to be before April 2004, when the LLC was formed. Thus, it seems clear that the promise was made while the sales of parcel 5 and 6, and perhaps also parcel 4, were pending.

Consistent with this view, the Norris Company admits in its brief that, when Dendy first proposed to form the LLC, he had already begun selling at least some of the outparcels.

14 At trial, counsel for the Norris Company argued that the escrows on parcels 5 and 6 closed before the infrastructure improvements were actually completed — i.e., the purchasers of parcels 5 and 6 evidently waived this contingency and agreed to allow the infrastructure improvements to be completed later. Even if so, this is irrelevant. What matters is that, *at the time when* Dendy supposedly promised that Norris would not be liable for more than $200,000 in infrastructure improvements, any such promise was inconsistent with the *then-existing* purchase agreements.

15 Thus, even assuming the promise was made, Norris's reliance on it was not reasonable, as promissory estoppel would require. (See *Flintco Pacific, Inc. v. TEC Management Consultants, Inc.* (2016) 1 Cal.App.5th 727, 734.)

Admittedly, the purchase agreement for parcel 4 did not expressly require Dendy-Norris to complete the site work. However, it also did not expressly require the *purchaser* to complete the site work. The Dendy Company's expert witness on construction and development testified that, if the purchase agreement for a parcel in a development is silent on this point, it is the custom in the industry that the developer would be responsible. The buyer "would expect . . . the infrastructure would be part of their purchase price . . . ." "Otherwise, you've bought a useless piece of land."

If Norris had claimed that the LLC was supposed to pay for 100 percent of infrastructure improvements, he might have had more credibility. The supposed $400,000 cap, however, had no logical explanation.[16] As Jason Michael testified, Norris conceded that he had agreed to pay for utilities, grading, and other things, but these simply could not be done for $400,000.

Second, no one else — not the LLC, not the purchasers of the outparcels — ever assumed this obligation. The Norris Company argues that "[the Norris Company] and [the Dendy Company] were free to enter into a contract with [the LLC] under which the latter undertook the infrastructure improvement obligations." However, as the trial court reasoned, documentary evidence indicated that they never did.

The Dendy Company's expert witness conceded that "one developer can transfer to another developer the responsibility to perform Conditions of Approval . . . ." He

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[16] As counsel for the Dendy Parties put it below, "That's just the number they came up with."

added, however, that that would be "a huge change with a huge price tag attached to it. I would expect to see something to memorialize that so, if somebody got hit with a bus, they could refer to that document." There was no such document.

The private placement memorandum for the LLC — used to market shares of the LLC to investors — did not say that the LLC would be assuming the liability for infrastructure improvements. Likewise, the LLC's Operating Agreement did not mention this. Most significantly, if there were such an agreement, one would expect to find it in the April 2004 purchase agreement by which the Norris Company and the Dendy Company sold the Glenwood parcel to the LLC. But it is not there. And Norris signed this document.

Norris claimed that Dendy promised to form a landowners' association, which would require purchasers of the outparcels to pay for some of the infrastructure improvements. However, this was inconsistent with the preexisting purchase agreements for parcels 5 and 6, which, as discussed, required Dendy-Norris to complete all site work. Moreover, three or four of the outparcels had not yet been sold. (See fn. 7, *ante*). Dendy could hardly guarantee that future purchasers would agree to pay for infrastructure improvements.

Later, in December 2004, the purchasers of some of the outparcels did agree to a set of conditions, covenants, and restrictions (CC&Rs) for Margarita Ville. Norris even signed the CC&Rs. Nothing in the CC&Rs, however, obligated individual parcel owners to pay for infrastructure improvements.

Norris also claimed that Dendy promised that purchasers of the outparcels would have to pave the portion of the road adjacent to their parcels. But — as the Dendy Company argues — this would be a crazy way to build a road. The Dendy Company's expert witness testified that *all* of the infrastructure improvements had to be completed before the city would issue a building permit for *any* parcel. Thus, even if the purchaser of parcel 1 did install its own paving, it could not get a building permit for parcel 1 until all of the other purchasers of all of the other parcels had installed their paving. Moreover, the conditions of approval required all utilities to run under the road. Thus, the purchaser of parcel 1 could not pave its portion of the road until after someone (presumably Dendy-Norris or the LLC) had completed *all* of the utilities.

Third, according to Dr. Williams, Dendy told him that Dendy-Norris was liable for all infrastructure improvement costs, and that the LLC was not. The Norris Company concludes that either Dendy was lying then or Williams is lying now. However, an equally reasonable conclusion is that Dendy never made the asserted promise.[17]

Fourth and finally, there was evidence that Norris admitted being liable for half of the infrastructure improvements.

Kelli Jones testified that, at the meeting in September 2005, he said he would pay for the infrastructure improvements, and he agreed to have his share of the proceeds of

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[17] Norris testified himself that Dendy "would never try to renege . . . on a deal."

the sale of the Glenwood parcel placed in a holdback account. As his share totaled $654,248, it cannot be argued that he was admitting only $200,000 worth of liability.

We recognize that Greg Dendy gave a different account of the meeting. He testified that, when Norris was asked if he would pay for the infrastructure improvements, he responded by demanding updated bids. This is hardly an unambiguous commitment to pay. However, if Norris believed his liability for infrastructure improvements was limited to $200,000, the bid amounts would have been irrelevant.

Norris, of course, disputed the testimony of both Kelli Jones and Greg Dendy. He testified that, at the meeting in September 2005, he denied any liability for the infrastructure improvements. Under the substantial evidence standard of review, however, we must resolve all conflicts in the evidence in favor of the judgment. Also, Norris did *not* claim that he said, at that meeting, that his liability was limited to $200,000. This suggests that he arrived at this position later.

Similarly, at the November 2005 meeting, according to Kelli Jones, Norris said again that he was going to pay for the infrastructure improvements, and he agreed to the holdback account.

This time, it was Mrs. Dendy who gave a somewhat different account. She testified that Norris "told Glenwood to put some of its money in escrow and they'd talk about it." Again, while this was hardly an unambiguous commitment to pay, it affirmatively urged both the Dendy Company and Glenwood to enter into the purchase agreement right away — even though the purchase agreement required $2.2 million in infrastructure improvements and a holdback account. Mrs. Dendy testified that she concluded that Norris was agreeing to pay. And once again, Norris evidently did *not* say that his liability was limited to $200,000.

2. *Evidence cited by the Norris Company does not compel a different conclusion.*

The Norris Company argues that, in the following nine respects, the evidence supports its claim that its liability for infrastructure improvements was limited to $200,000.

Arguments number 7 through 9 were raised for the first time in the Norris Company's reply brief. We therefore deem them forfeited. (*W.S. v. S.T.* (2018) 20 Cal.App.5th 132, 149, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."].) We do discuss them on the merits below, but solely in the alternative.

1. Dendy-Norris sold the Glenwood parcel to the LLC for $3 million; the Norris Company's share of this was $1.5 million. The trial court held the Norris Company liable for $1,751,223 in infrastructure improvements.[18] The Norris Company argues that it would never have agreed to pay more for infrastructure improvements than it stood to gain.

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[18] We do not understand how the Norris Company calculated the $1,751,223 figure; we accept it only for the sake of argument.

This overlooks the fact that it was *already* obligated to pay for half of the infrastructure improvements. As discussed in part V.C.1, *ante*, this resulted from the conditions of approval; it also resulted from the purchase agreements for parcels 5 and 6.

In addition, by the time Dendy died, the estimated cost of the infrastructure improvements was $2.2 million. The Norris Company's share of this would have been only $1.1 million — still a chunk, but less than $1.5 million.

And finally, well, sometimes good people make bad deals. Even assuming this was some evidence supporting the Norris Company's position, there was still substantial evidence supporting the opposite position.

2. The LLC agreed to buy the Glenwood parcel in April 2004 for $3 million and agreed to sell it in November 2005 for $7.4 million. It is not reasonable to suppose that it more than doubled its value in a year and a half.[19] Rather, the difference must be the value of the obligation that the LLC assumed to pay for infrastructure improvements.

The sale to the LLC was not an arm's length transaction; Dendy was both the seller, wearing his Dendy-Norris hat, and the buyer, wearing his LLC hat. Thus, there is no reason to suppose that $3 million was a fair market value. For example, even before the sale to the LLC, Dendy opined that the Glenwood parcel was worth over $4 million.

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[19] The Norris Company describes the time period as "only six months." However, it is comparing the *closing* date of the sale to the LLC with the date of Glenwood's *offer to purchase* — apples to oranges. The price of the sale to the LLC was fixed on the date of the LLC's *offer to purchase*.

In any event, it is not impossible that the real estate market changed, that the $3 million purchase price was too bearish, or that the $7.4 million selling price was too bullish. Once again, arguably the trial court *could* have found in favor of the Norris Company based on this evidence, but there was still substantial evidence supporting the opposite position.

3. The agreement to sell the Glenwood parcel to the LLC stated, "the Property is sold (a) in its PRESENT physical condition as of the date of Acceptance . . . ." (Bolding omitted.)[20] The Norris Company concludes that the seller (i.e., Dendy-Norris) was not obligated to improve it.

This provision, however, only meant that, when escrow closed, the property would be in the same condition as when escrow opened. It is perfectly compatible with an obligation to build infrastructure improvements *after* escrow closed.[21]

4. The Norris Company compares the sale to Glenwood with two proposed sales that were never consummated. In one, the buyer's letter of intent (drafted by Kelli Jones) expressly provided that the seller would have to complete all site work. In the other, the buyer's formal offer (also drafted by Kelli Jones) did not so provide. The Norris

20 The Norris Company also points to similar language in the LLC Operating Agreement and in the private placement memorandum.

21 In a single-sentence argument, the Norris Company asserts that, if it still had to pay for infrastructure improvements, even after the sale to the LLC, then Dendy breached a fiduciary duty to disclose that fact to Norris. The Norris Company's complaint, however, did not plead this as a breach of fiduciary duty.

Company concludes that the absence of any such provision in the agreement to sell to the LLC meant that the seller had no obligation to complete any site work.

As already mentioned, however, the Dendy Company's expert testified that, *regardless* of whether a purchase agreement so provides, it is the custom in the industry that the seller of one parcel in a development remains obligated to complete all site work.

In addition, Kelli Jones repeatedly testified that the two documents were not comparable, in part because one was a letter of intent while the other was a formal offer. In fact, the letter of intent resulted in a formal offer, portions of which are in the record; those portions do *not* provide that the seller would have to complete all site work. This is consistent with the expert's testimony that such a provision would be implied in any event.

5. In January 2006, before the sale to Glenwood closed, an attorney for the LLC wrote a letter stating that Norris had refused to fund the holdback account. In the Norris Company's view, this proves that (1) Norris never agreed to fund the holdback account, and (2) the LLC knew that Norris never agreed to fund the holdback account and thus could not have relied on his agreement.

This ignores the sequence of events. At the meetings in September and November 2005, Norris indicated that he would pay for the infrastructure improvements and he would contribute to the holdback account. On November 14, 2005, in reliance on these statements, the LLC entered into the purchase agreement with Glenwood, which required a $2.2 million holdback account. Sometime before escrow closed, however, Norris refused to fund the holdback account. Rather than breach its agreement with Glenwood, the LLC determined to put the Norris Company's proceeds from the sale into the holdback account and to make up the shortfall itself. In this coherent sequence — which is consistent with the attorney's letter — Norris *did* agree to fund the holdback account, and the LLC *did* rely on his agreement.

6. Dendy originally proposed to have investors in the LLC contribute $4 million, as shown in the first (May 2004) private placement memorandum. Later, he increased this to $5 million, as shown in a second (September 2004) private placement memorandum. According to Norris, Dendy said the extra million was for infrastructure improvements.

Once again, the trial court did not have to believe Norris. If Dendy had already promised that the LLC would pay for infrastructure improvements, presumably the first private placement memorandum would have been for $5 million, too. And if the extra million was indeed intended to pay for infrastructure improvements, it fell far short of the $2.2 million required.

As the trial court found, neither private placement memorandum said that the LLC was going to pay for infrastructure improvements. The second private placement memorandum said only that the extra million would go to working capital; working capital, in turn, would go to "property taxes and assessments, planning and development costs, management fees, contingencies and other costs." Arguably, "development costs," standing alone, could be construed as including infrastructure improvement costs.

Elsewhere, however, the private placement memorandum said, "The Company intends to finance the development of the Property by obtaining a construction loan . . . ." It would use investor funds "to finance its operations" only "[u]ntil funding of a construction loan . . . ." In other words, working capital was not intended to be a significant source of funds for actual construction; it would merely tide the LLC over until it was able to obtain a construction loan.

7. According to Mrs. Dendy and Greg Dendy, at the meetings in September and November 2005, Norris did not unequivocally agree to fund the holdback account.

These witnesses testified, however, that Norris did agree, albeit equivocally. In any event, this argument overlooks the fact that Kelli Jones also testified that Norris agreed, and in her account, unequivocally.[22] We repeat that, when the evidence is in conflict, we must accept the evidence that supports the judgment. "The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other

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[22] In its reply brief, the Norris Company argues for the first time that promissory estoppel requires a "clear and unambiguous" promise (e.g., *Flintco Pacific, Inc. v. TEC Management Consultants, Inc.*, *supra*, 1 Cal.App.5th at p. 734), and that Norris's statements at the meetings in September and November 2005 were too ambiguous to be the basis for promissory estoppel. It forfeited this argument by failing to raise it in its opening brief. In any event, Kelli Jones testified to a clear and unambiguous promise.

Separately and alternatively, the Dendy Company was entitled to recover based on breach of contract, not just promissory estoppel. The Original Agreement provided for a 50-50 split of all costs. Norris's statements at the September and November 2005 meetings were evidence that the Original Agreement had never been modified in that respect. When used for that purpose, the statements did not have to be unambiguous.

evidence, inconsistent or false as to other portions. [Citations.]" (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.)

8. The Norris Company claims the parties' attorneys stipulated that Dendy and Norris orally agreed to a $400,000 cap. Not so.

On cross-examination, Norris denied having an oral agreement with Dendy regarding infrastructure improvements. The trial court asked counsel for the Dendy Company, "Well, there was an oral agreement up to $400,000. Right?" Counsel for the Dendy Company said, "Yes." However, he immediately clarified that he was only trying to get Norris to admit that there was an oral agreement: "[I]f they're willing to stipulate that there was an oral agreement for these improvements, . . . I can go over them one by one, subject to this cap . . . ." He did *not* offer to stipulate that the oral agreement was *in fact* subject to a $400,000 cap; he merely acknowledged that this would be Norris's position.

Counsel for the Norris Company started to offer to stipulate to something, but he never said what; he stopped himself and made an offer of proof instead.

Just minutes later, counsel for the Dendy Company offered again to stipulate that *it was Norris's position* that the oral agreement was subject to a $400,000 cap: "I will stipulate that *they have* this other part of the oral agreement for the $400,000. I don't think we need to keep in every response to every question pointing out that *they believe* there's this $400,000 limit." (Italics added.) Counsel for the Dendy Company did not respond.

In sum, then, counsel for the Dendy Company never offered to stipulate that there actually was a $400,000 cap; he merely offered to stipulate that this was Norris's position. Plus, counsel for the Norris Company never joined in any stipulation on the subject.

9. The trial court found that the Original Agreement called for Margarita Ville to "be subdivided into individual parcels and sold as undeveloped land." The Norris Company concludes that that agreement did not contemplate any construction, and hence the provision that Norris would pay half the costs did not extend to any costs of construction.

This interpretation is untenable. Norris did not testify that, in the Original Agreement, the land was to be sold "unimproved." To the contrary, he agreed that Dendy was supposed to "do everything that was necessary to get it ready for sale" and "whatever needed to be done at the city." Dendy would "supervise whatever improvements . . . we put in." This included "rough grading" and "drainage." And there was ample evidence that a subdivider cannot obtain subdivision map approval unless it agrees to construct infrastructure improvements.

The words "undeveloped" and "unimproved" are ambiguous; they can refer to completely raw land, or to land that does not yet have finished buildings. Here, it is clear that the trial court meant the latter. Indeed, if it really meant that the land was to be sold in a completely raw state, we would be forced to conclude that that that finding was not supported by substantial evidence.

Finally, even assuming the Original Agreement did not obligate Norris to pay any construction costs, it is clear that it was subsequently modified. In 2003, when Dendy-Norris sold the first outparcels, the purchase and sale agreements required it to complete all site work; Norris signed these agreements on behalf of the Norris Company. Thus, manifestly, Norris realized there would be construction costs, and he agreed to pay them.

D. *Conversion of the Norris Company's Share of the Proceeds of the Sale to Glenwood.*

Finally, the Norris Company argues that, even assuming it was liable for half of all infrastructure improvements, the Dendy Company still did not have the right to apply its $654,248 share of the proceeds of the sale to Glenwood to infrastructure improvements without its consent.

It cites no relevant authority. It merely quotes *Haigler v. Donnelly* (1941) 18 Cal.2d 674, to the effect that: "When an agent is required to turn over to his principal a definite sum received by him on his principal's account, the remedy of conversion is proper. [Citation.]" (*Id*. at p. 681.) This assumes, however, what the Norris Company needs to prove — that the Dendy Company *was* required to turn over the $654,248.

"'"We are not bound to develop appellant['s] argument for [it]. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived." [Citations.]' [Citation.]" (*Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939.)

In any event, the Norris Company cannot show that the asserted error was prejudicial. If we were to hold that the Dendy Company owes the Norris Company $654,248 for the proceeds of the sale to Glenwood, then the Norris Company would owe the Dendy Company $654,248 more to pay for the infrastructure improvements. At most, the Norris Company could seek punitive damages for conversion; however, given the trial court's other rulings, we see no reasonable possibility that it would find that the conversion was committed with oppression, fraud, or malice, as required for an award of punitive damages. (See Civ. Code, § 3294.)

VI

DENIAL OF LEAVE TO AMEND THE CROSS-COMPLAINT

In the alternative to its contention that the trial court erred by requiring it to pay half of the infrastructure improvement costs, the Norris Company also contends that the trial court erred by refusing to let it amend its cross-complaint after Phase II of the trial.

A. *Additional Factual and Procedural Background*.

In Phase II, the trial court ruled that the Norris Company was liable for half of the infrastructure improvement costs. The Norris Company then filed a motion for leave to amend its cross-complaint to conform to proof. It sought to add a cause of action for fraud, alleging that Dendy and all cross-defendants (other than Dr. Williams) had falsely represented that, after the sale to the LLC, the Norris Company would no longer be responsible for infrastructure improvement costs.[23]

The trial court denied the motion, on two grounds: First, there was no supporting declaration, and hence no showing of an excuse for the Norris Company's delay in seeking to amend; and second, the Dendy Parties would be prejudiced. It also opined that, based on the evidence it had already heard, there was no false representation.

B. *Discussion.*

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading . . . ." (Code Civ. Proc., § 473, subd. (a)(1); see also *id.*, § 576.)

"[T]here is a strong policy favoring liberal allowance of amendments to pleadings even if they are requested during trial. [Citation.]" (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 383.) "Furthermore, pleadings are subject to amendment to conform to proof [even] after trial. [Citation.]" (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1237, fn. 12.)

"Generally, 'the trial court has wide discretion in allowing the amendment of any pleading [citations].' [Citation.]" (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872-873.) "In exercising its broad discretion, the court is usually guided by whether:

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[23] The Norris Company also sought to tweak various other allegations — primarily relating to cross-defendants' alleged breaches of fiduciary duties — but it does not appear to contend that the trial court erred by disallowing this.

"— there is a *reasonable excuse* for the delay in seeking leave to amend;

"— the change relates to the *facts* or only to legal theories; and

"— the opposing party will be *prejudiced* by the amendment. [Citations.]" (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2018) ¶ 12:393, p. 12-89.)

"'The trial court's ruling on a motion to amend a pleading is reviewed under an abuse of discretion standard [citation] . . . .' [Citation.]" (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 707.)

As mentioned, the trial court denied the motion because, among other things, it was not accompanied by a declaration. The Norris Company does not argue that this ground was erroneous. Accordingly, it has forfeited any such argument. (*Edwards v. Heartland Payment Systems, Inc.* (2018) 29 Cal.App.5th 725, 735.) We may reject this contention for this reason alone.

Alternatively, the trial court denied the motion because the Dendy Parties would have been prejudiced. Once again, the Norris Company does not discuss prejudice in its opening brief, and thus it has forfeited any argument to the contrary.

In any event, the trial court did not abuse its discretion by finding prejudice. Phase II, which was devoted to the issue of the infrastructure improvements, had already been tried. This issue had been pleaded solely as a breach of contract and a breach of fiduciary duty. Thus, the Dendy Parties had no reason or opportunity to litigate such elements of fraud as knowledge of falsity or justifiable reliance. (See generally *Conroy v.*

Regents of University of California (2009) 45 Cal.4th 1244, 1255 ["The elements of fraud . . . are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage."].)

Indeed, the Norris Company appears to *concede* that there was no knowledge of falsity. It states, "The Norris Company of course does not believe that . . . Dendy intended to act tortiously in making the limited infrastructure assurances . . . . The Norris Company believes Dendy intended to honor those limited infrastructure assurances, and would have honor[ed] those assurances but for his untimely death." (Italics omitted.) It does argue that, after Dendy's death, his "limited infrastructure assurances . . . became *retroactively* tortiously misleading." (Italics omitted, italics added.) However, it cites no authority for a cause of action for retroactive fraud, and we are not aware of any.

Finally, the Norris Company has not shown that the asserted error was prejudicial. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) To do so, it would have to show that "'there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.' [Citation.]" (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 939.) The trial court, however, had already heard all of the evidence relating to the infrastructure improvements, and it concluded that there was no misrepresentation. Hence, even if allowed to amend, the Norris Company would have been no better off.

VII

PREJUDGMENT INTEREST ON THE ADVANCES

The Norris Company contends that it was entitled to prejudgment interest on certain advances that it made to the Dendy Company for project costs.

A. *Additional Factual Background*.

In 1999, around the time when Dendy and Norris entered into the Original Agreement, Dendy said he was "pretty short of funds" and asked Norris to "advance" Dendy's share of the expenses. He added that he would pay it back "when [they] started selling the parcels." He offered to pay ten percent interest. Norris agreed.

In 2002, Norris told Dendy that he was no longer able to pay Dendy's share of the expenses. We will refer to the amounts that Norris advanced between 1999 and 2002 to pay Dendy's share of the expenses as the "Advances."

Although some parcels were sold between 2003 and 2005, Dendy did not repay the Advances at that time, explaining that "he still needed the money." He said he would pay them back when Margarita Square started to generate revenue. Again, Norris agreed. 291-292, 302-303}

After Dendy died, the Dendy Company's books and records were found to be incomplete; they only went back to December 2003.

Norris created a ledger, based on his own check register, listing all of the

Advances.[24] A few months after Dendy died, he told Mrs. Dendy that Dendy owed him money and gave her a copy of his ledger. He knew the Dendy Company was short of funds, so he did not demand repayment at that time. Mrs. Dendy said only that this was the first she had heard of this.

Norris then called James Roick (Dendy's son-in-law) and told him about the Advances. Roick said he would look into the matter and meet with Norris later.

Meanwhile, in November 2005, Margarita Square started to generate lease revenue.

Around January 2006, Norris called James Roick again, but Tami Roick answered the phone. Norris said he was calling to talk to James "about some advances that [he] had made to [Dendy]." Tami yelled, screamed, and cursed at him, and finally told him to "fuck off."

According to Mrs. Dendy, both James Roick and Jason Michael asked Norris to provide backup documentation. Jason Michael testified that he asked Norris for backup at the November 2005 meeting. James Roick advised Mrs. Dendy, "[W]ithout any backup, you don't owe anything." Norris testified, however, that no one from the Dendy side ever asked him for backup documentation.

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[24] The ledger also listed a $125,000 loan that Norris had made to Dendy. At trial, the amounts in the ledger — i.e., the Advances plus the $125,000 loan — were sometimes referred to as the "ledger claim." Here, we discuss only the Advances. In part XI, *post*, we discuss the $125,000 loan.

B. *The Trial Court's Ruling*.

The trial court ruled that the Dendy Company owed the Norris Company $579,067, representing the Advances. It also found that Norris and Dendy agreed to "interest on any monetary advances."

However, it also ruled that the Norris Company's claim for the Advances, like the parties' other claims against each other, were to be determined in the accounting: "I think it's an ongoing business relationship, and it can't be determined who owes what until the accounting is completed." For this reason, it declined to award any prejudgment interest on the Advances.[25]

C. *Analysis*.

Civil Code section 3287 governs prejudgment interest. Subdivision (a) of that section, as relevant here, provides: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day . . . ." This subdivision applies to contractual as well as noncontractual claims. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 795-798.)[26]

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[25] The Norris Company states: "For reasons not understood by [the Norris Company], the court chose not to grant interest on the Advances . . . ." The trial court, however, explained its reason for this clearly.

[26] Despite Civil Code section 3287, subdivision (a), the parties to a contract can agree that prejudgment interest will apply to amounts due under the contract, even if they are uncertain. (*Roodenburg v. Pavestone Co., L.P.* (2009) 171 Cal.App.4th 185,

"Damages are certain or capable of being made certain by calculation, or ascertainable, for purposes of the statute if the defendant actually knows the amount of damages or could calculate that amount from information reasonably available to the defendant. [Citation.] In contrast, damages that must be determined by the trier of fact based on conflicting evidence are not ascertainable. [Citation.]" (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 150-151.)

"Uncertainty as to *liability* is irrelevant. 'A dispute concerning liability does not preclude prejudgment interest in a civil action.' [Citation.] The certainty required by section 3287(a) is not lost when the existence of liability turns on disputed facts but only when the amount of damages turns on disputed facts. [Citation.]" (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 535-536.) Moreover, "damages are not made uncertain by the existence of *unliquidated* counterclaims or offsets interposed by defendant. [Citation.]" (*Id*. at p. 536, italics added.)

It has been said that, "[g]enerally speaking, where an accounting is required in order to arrive at a sum justly due, interest is not allowed. [Citations.]" (*Stockton Theatres, Inc. v. Palermo* (1953) 121 Cal.App.2d 616, 632.) Arguably, a blanket rule that prejudgment interest is *never* available whenever an accounting is necessary would

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[footnote continued from previous page]
191.) Here, Norris and Dendy orally agreed to ten percent interest. That agreement was unenforceable, however, because an agreement for interest in excess of seven percent must be in writing. (Civ. Code, § 1916-1.) As a result, the Norris Company had a right to interest solely as a matter of statute, not as a matter of agreement.

conflict with the rule that prejudgment interest *is* available, as a matter of right, on a liquidated claim, despite any unliquidated offsets or counterclaims. Thus, "[a]lthough an accounting action is prima facie evidence a claim is uncertain, [courts] do not foreclose the possibility of prejudgment interest in an accounting action where equity demands such an award." (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 909.) Rather, the focus should be on whether the accounting was necessary to resolve factual issues with respect to the *particular claim* on which prejudgment interest is sought.

Here, there were disputed factual issues concerning the Advances; the accounting necessarily addressed these. The accountant disregarded some of the entries in Norris's ledger because they were "unverified" — i.e., "there was insufficient proof that the expense was actually incurred." Later, the trial court disagreed, because it found that Norris's testimony concerning the ledger entries was credible. The fact, however, that its decision to award the Advances turned on witness credibility demonstrates that this claim was subject to factual disputes and hence uncertain.

VIII

THE EXCLUSION OF EVIDENCE RELEVANT TO THE "TORT OF ANOTHER" DOCTRINE

The Norris Company contends that the trial court erred by preventing it from presenting evidence that the Dendy Parties were liable under the "tort of another" doctrine.

A. *The Tort of Another Doctrine*.

"[A]s a general proposition each party must pay his own attorney fees." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504.) However, "[s]everal exceptions to this general rule have been created by the courts." (*Id.* at p. 505.) One of these exceptions, "sometimes referred to as the 'tort of another' or 'third party tort' exception, allows a plaintiff attorney fees if he is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. [Citation.]." (*Ibid.*)

"Attorney[']s fees in this context are to be distinguished from 'attorney's fees *qua* attorney's fees,' such as those the plaintiff incurs in suing the tortfeasor defendant. [Citation.] Rather, when a defendant's tortious conduct requires the plaintiff to sue a third party, or defend a suit brought by a third party, attorney fees the plaintiff incurs in this third party action 'are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action.' [Citations.]" (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1325.)

The Norris Company argues that various alleged breaches of fiduciary duty by Dendy caused it to sue or be sued by the Dendy Parties. Similarly, it argues that various alleged breaches of fiduciary duty by each of the Dendy Parties caused it to sue or be sued by the other Dendy Parties. It cites two instances in which the trial court supposedly prevented it from presenting evidence to support this theory. We discuss these in turn.

B. *The Cross-Examination of Mrs. Dendy.*

1. *Additional factual and procedural background.*

When counsel for the Norris Company cross-examined Mrs. Dendy, he asked her whether "investors in [the LLC]" had insisted that she sue the Norris Company. Counsel for the Dendy Parties objected, based in part on relevance, and the trial court sustained the objection.

Counsel for the Norris Company then asked, "[W]hat gave rise to your filing of this lawsuit?" Counsel for the Dendy Parties objected again, and the trial court sustained the objection based on relevance.

Counsel for the Norris Company then made an offer of proof that three of the investors in the LLC had threatened to sue Mrs. Dendy unless she filed this action. He added, "[W]e believe it's material to prove that[,] contrary to suing [the Norris Company] because they had any understanding that [the Norris Company] had an actual agreement to pay these infrastructure improvement costs, [the Dendy Company] was pressured into suing [the Norris Company] because it had been threatened . . . ."

He argued that the evidence was relevant "to prove our claims of fiduciary duty." He explained, "[W]hen [the LLC and the Dendy Company] elected to sue . . . [the Norris Company], at the pressure of the investors, it was a breach of . . . fiduciary duty . . . because neither [the LLC] nor [the Dendy Company] had a justifiable basis for suing . . . ."

The trial court nevertheless adhered to its rulings sustaining the objections.

2. *Discussion*.

The Norris Company's counsel's offer of proof and argument were to the effect that *filing this action* was a breach of fiduciary duty. Under the litigation privilege, however, a party cannot be liable for filing a lawsuit on a breach of fiduciary duty theory. (Civ. Code, § 47, subd. (b); see *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 811-813.) It can be liable solely on a malicious prosecution theory, which is an exception to the litigation privilege. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.) Counsel for the Norris Company did appear to assert a malicious prosecution theory, arguing that the action was filed without probable cause. (See generally *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775.) However, there were two problems with that theory: the Norris Company had not pleaded it; and there had been no favorable termination of this action. (See *ibid*.)

Significantly, counsel for the Norris Company did *not* assert that the evidence was relevant to the Dendy Parties' liability for attorney fees on a tort of another theory. This forfeited its present contention. (Evid. Code, § 354, subd. (a); see also *People v. Foss* (2007) 155 Cal.App.4th 113, 126-128 [offer of proof is required to preserve claim of improper exclusion when cross-examination question is outside the scope of the direct].)

C. *The Direct Examination of Barksdale*.

Counsel for the Norris Company called Edward "Buddy" Barksdale, one of the investors in the LLC. The trial court sustained objections to most of the questions to Barksdale on grounds other than relevance (e.g., vague and ambiguous, hearsay, and/or lack of foundation). However, it also sustained the following objections, which were made, at least in part, on relevance grounds:

"Q Did you ever communicate to anyone a threat to sue in connection with the LLC or in connection with [the LLC] investment?

"[COUNSEL FOR CROSS-DEFENDANTS]: Objection, hearsay and relevance, Your Honor.

"THE COURT: Sustained."

"Q . . . Did you ever discuss with anyone the possibility of suing Pat Dendy or [the LLC]?

"[COUNSEL FOR CROSS-DEFENDANTS]: Objection, hearsay, vague, and relevance, Your Honor.

"THE COURT: Sustained."[27]

"Q . . . Did you ever threaten to sue Pat Dendy in connection with [the LLC]?

"[COUNSEL FOR CROSS-DEFENDANTS]: Objection, hearsay and relevance, Your Honor.

"THE COURT: Sustained.

"Q . . . Do you know of anyone having ever threatened to sue Pat Dendy in connection with [the LLC]?

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[27] The trial court indicated, however, that it was sustaining this objection based on vagueness and hearsay, rather than relevance.

“[COUNSEL FOR CROSS-DEFENDANTS]: Objection, hearsay and relevance, Your Honor.

“THE COURT: Sustained.

“Q . . . Are you aware of the investors in [the LLC] at any time authorizing Bill Dendy or Kelli Jones to take money from [the LLC] to use for other purposes?

“[COUNSEL FOR CROSS-DEFENDANTS]: Hearsay, vague, leading, relevance, Your Honor.

“THE COURT: Sustained.”

The Norris Company does *not* argue that the trial court erred by sustaining any objections *other than* relevance. And with respect to relevance, the Norris Company’s counsel did not argue below that his questions were relevant to a tort of another theory. He merely asserted several times that they were “foundational,” without explaining what they were foundational *for*. Accordingly, once again, he forfeited the Norris Company’s present contention.

D. *Alternative Ground Applicable in Both Instances*.

Even aside from forfeiture, this contention is not well-taken.

“[T]he tort of another doctrine does not apply to the situation where a plaintiff has been damaged by the joint negligence of codefendants. . . . If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case . . . . Such a result would be a total emasculation of Code of Civil Procedure section 1021 in tort cases.’”

(*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 80; accord, *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 57.)

Here, the Norris Company is seeking attorney fees that each of the Dendy Parties caused it to incur in *this* action against their co-cross-defendants. It is not seeking any attorney fees that the Dendy Parties caused it to incur in some *previous* action against *other* parties. It does seem, at least in part, to be seeking attorney fees that other parties (i.e., Barksdale and other investors in the LLC) caused it to incur in *this* action; however, it cannot recover these from *the Dendy Parties*.

IX

LIABILITY FOR FAILURE TO ACCOUNT

The Norris Company contends that the trial court erred by ruling that the Dendy Company was not liable for failure to account.[28]

In its statement of decision, the trial court ruled, "[The Dendy Company] did not breach a fiduciary duty to account because it regularly provided an accounting to [the Norris Company]."

The Norris Company claims "the evidence is absolutely uncontroverted" that Dendy, before he died, "provided literally no accounting . . . ." It points to the testimony

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[28] It also makes this argument with respect to Dendy Real Estate, apparently on the theory that Dendy Real Estate was the general partner of the Dendy Company. Thus, our discussion of the Dendy Company's liability in this section applies equally to Dendy Real Estate.

of the accounting referee that there was "a complete void of any contemporaneous accounting records . . . ." It concludes that the Dendy Company is liable for this.

Dendy's asserted failure to account, however, is by no means uncontroverted. For example, as the Dendy Parties point out, Dendy regularly showed Norris invoices for expenses. He had to; at that point, Norris was paying not just his own but also Dendy's share of all expenses. Norris admitted that, between 1999 and 2002, there was never any time when he "asked to see some records and [Dendy] said no[.]"

Thus, once again (see part V.B, *ante*), the Norris Company has forfeited this contention by failing to summarize the relevant evidence fully and fairly.

The accountant's testimony alone does not conclusively establish a failure to account. We recognize that, in addition to his testimony, there was evidence that the Dendy Company did not have any books and records for any time prior to December 2003. However, as just discussed, there was also evidence that such books and records did exist, at least at one time. There was no evidence as to how they disappeared — presumably because Dendy was dead and nobody else knew. If they disappeared without fault on Dendy's part, then his failure to keep them would not be a breach of fiduciary duty. (See Corp. Code, § 16404, subd. (c) ["A partner's duty of care . . . is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."].) The trial court could reasonably find that the Norris Company did not carry its burden of proof as to fault.

The Norris Company also relies on the trial court's remark, in Phase I of the trial, that "Mr. Dendy had a fiduciary duty to account from the beginning, *and that did not happen*." (Italics added.) However, "'[c]ourts are not bound by their tentative rulings' and 'a judge's comments in oral argument may never be used to impeach the final order.' [Citations.]" (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

In its reply brief, the Norris Company argues that the trial court's statement of decision is inconsistent. As it notes, the statement of decision says, "No accounting occurred during Dendy's life." Once again (see part V.C.2, *ante*), we deem this contention forfeited because it was not raised in the opening brief.

In any event, this quotation is taken out of context. In ruling that a claim for repayment of Norris's $125,000 loan to Dendy (see part XI, *post*) was not barred by the statute of limitations, the trial court stated, "Dendy promised to repay Norris at the time they settled their accounts on the [Original] Agreement. The Development was not completed before Dendy's death. No accounting occurred during Dendy's life. The accounting has just been completed. A cause of action for breach of contract does not accrue before the time of breach." Plainly, it was referring to a *final* accounting to be done after the development was complete.

Also in its reply brief, the Norris Company argues that the Dendy Company's refusal to repay the Advances because it lacked backup "conclusively establishes a breach of fiduciary duty to account." (Bolding omitted.) Once again, it forfeited this argument by failing to raise it in its opening brief. Moreover, the Dendy Company refused to pay because the books and records prior to December 2003 were missing. As a result, the parties disagreed over what an accounting would show. However, this does not show a failure to account.

Finally, the Norris Company has not shown that the asserted error was prejudicial. It claims that it was entitled to "substantial damages incurred directly as a result of the Dendy Company's failure to account." However, it does not specify what those damages were. Moreover, in the end, by filing this action, it got an accounting. It has not explained how it was damaged by not getting it sooner.

X

REAL ESTATE BROKER'S COMMISSIONS

The Dendy Company contends that the trial court erred by requiring it to reimburse the Norris Company for commissions paid to Dendy Real Estate.

A. *Additional Factual Background*.

In November 1999, while negotiating the Original Agreement, Norris wrote Dendy a letter noting that Dendy was proposing to "sell without commission."

Norris testified that, as part of the Original Agreement, Dendy agreed to "sell the property without [broker's] commissions . . . ."

Later, when parcels stated selling, Dendy asked Norris to pay the commissions anyway and said he would pay them back later. He explained that he was "running short" of cash. Norris agreed.

When parcels from Margarita Ville were sold, the purchase agreements generally included an integration clause, such as: "This Agreement supersedes any and all prior agreements between Seller and Buyer regarding the Property." Most of these agreements were signed by Dendy, on behalf of the Dendy Company, and by Norris, on behalf of the Norris Company.[29] In conjunction with these sales, Norris and Dendy also signed escrow instructions directing the payment of a commission to Dendy Real Estate.

Similarly, when parcels from Margarita Square were leased, Norris sometimes (though not always) signed or initialed commission instructions.

Norris's ledger did not list the commissions. He explained that, at the time, Mrs. Dendy was "struggling" financially, and he "didn't feel like hurting her right then."

B. *The Trial Court's Ruling*.

The trial court ruled that the Dendy Company owed the Norris Company $271,256, representing its half-share of commissions paid to Dendy Real Estate.

C. *Analysis*.

1. *Sufficiency of the evidence*.

The Dendy Parties contend that there was insufficient evidence that Dendy agreed to forgo commissions.

Norris *testified* that Dendy agreed to forgo commissions. This, in itself, is substantial evidence. "[T]he testimony of a single witness, even that of a party, is

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[29] The Dendy Parties do not cite any similar integration clause in the lease agreements for Margarita Square.

sufficient to provide substantial evidence to support a finding of fact [citation]." (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1074.)

"'To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.' [Citation.]" (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 261.) "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.]" (*Ibid*.)

The Dendy Parties argue, however, that Norris's testimony on this point was not credible, for three reasons.

First, they argue that it was not supported by any documents. Actually, it was supported by at least one document — Norris's November 1999 letter stating that Dendy had offered to "sell without commission."

The Dendy Parties assert, however, that "the letter makes it clear that the discussions were never agreed upon." Not so. It makes it clear that they had not *yet* been agreed on. However, many of the other terms mentioned in the letter — that Norris would deed a half-interest in the properties to Dendy, that Dendy would develop them, and that they would split the profits 50-50 — ultimately became part of the Original Agreement. Moreover, the letter indicated that it was Dendy himself who had "proposed" to forgo commission. Why wouldn't Norris agree to this? Indeed, the letter itself can be read as expressing such agreement.

In any event, a witness's testimony does not need to be supported by documentary evidence.

Second, the Dendy Parties point to the fact that Norris signed escrow instructions authorizing the payment of commissions. Norris explained, however, that he and Dendy had modified the Original Agreement by agreeing that Norris would pay commissions up front and Dendy would repay them later.

The Dendy Parties protest that this is "illogical": "[The Dendy Company] and [the Norris Company] netted over $3.6 million *each* from the sales of the Margarita Ville parcels, evidencing that neither party would need extra cash from commissions . . . . The commissions, at most, would only net Dendy an extra $118,650, about 6% of the $3.6 million that [the Dendy Company] and [the Norris Company] received." Dendy, however, was involved in other developments of his own. The record does not show his overall financial position at any given time. Thus, Norris's testimony that Dendy "was running short" stands unrebutted.

Third and finally, the Dendy Parties note that Norris's ledger did not list the commissions. Norris explained, however, that he was trying to be "compassionate" to Mrs. Dendy. Also, there was no evidence that Norris intended the ledger to reflect *everything* he was owed. Somewhat to the contrary, he testified that he prepared it based on his check register; naturally, then, it included the Advances, which would be shown in the check register, but not the commissions, which would not.

In any event, regardless of whether we find Norris's testimony convincing, it was not physically impossible or self-evidently false. Thus, it constitutes substantial evidence.

2. *The parol evidence rule*.

The Dendy Parties also contend that enforcement of the oral Original Agreement, which provided for no commissions, violated the parol evidence rule, because the subsequent written purchase agreements did provide for commissions.

They did not raise this argument at trial. However, the parol evidence rule can be raised for the first time on appeal. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23.)

"When the parties to a written contract have agreed to it as an 'integration' — a complete and final embodiment of the terms of an agreement — parol evidence cannot be used to add to or vary its terms. [Citations.] When only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing. [Citations.]

"The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement. The instrument itself may help to resolve that issue. It may state, for example, that 'there are no previous understandings or agreements not contained in the writing,' and thus express the parties' 'intention to nullify antecedent understandings or agreements.' [Citation.] Any such collateral agreement itself must be examined, however, to determine whether the parties intended the subjects of negotiation it deals with to be included in, excluded from, or otherwise affected by the writing. Circumstances at the time of the writing may also aid in the determination of such integration. [Citations.]" (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225-226.)

"'Whether a contract is integrated is a question of law when the evidence of integration is not in dispute.' [Citations.]" (*Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987, 1001.)

As *Masterson* indicated, the presence of an integration clause is not controlling. (See also *Take Me Home Rescue v. Luri* (2012) 208 Cal.App.4th 1342, 1352 ["""In determining the issue, the court must consider not only whether the written instrument contains an integration clause, but also examine the collateral agreement itself to determine whether it was intended to be a part of the bargain."""].) At the same time, we by no means disregard the integration clauses. The written purchase agreements and written lease agreements were integrated with respect to the parties' understanding concerning the purchase and sale of the particular property. However, it would be absurd to suppose that they were integrated with respect to the understanding of the Dendy Company and the Norris Company concerning their mutual business enterprise. That was hardly something that would be set forth in each and every contract with a buyer or lessee, and there was no need to, because it was already part of their Original Agreement.

Thus, for example, the contracts with purchasers or lessees did not set forth the fact that the Dendy Company and the Norris Company were to share the profits 50-50. Likewise, they would not set forth the fact that the commissions to Dendy Real Estate were only a loan.[30]

3. *Oral modification*.

The purchase agreements for Margarita Ville parcels also included a clause requiring modifications to be in writing, such as: "Amendments to this Agreement are effective only if made in writing and executed by Buyer and Seller."

The Dendy Parties argue that any oral modification of the provisions in the purchase agreements for the payment of commissions would be ineffective. We may so assume. However, the trial court did not rely on any *subsequent* oral *modification*. Rather, it relied on *preexisting* oral agreements.

XI

THE $125,000 LOAN

The Dendy Company contends that the trial court erred by holding it liable for $125,000, plus interest, representing a loan that Norris made to Dendy.

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30 The Norris Company points out that the integration clauses referred to "prior agreements between Seller and Buyer"; it argues that they cannot be construed as integrating prior agreements between one seller (the Dendy Company) and the other (the Norris Company). We agree. However, at least one integration clause referred more broadly to the understandings and agreements of "the parties." We conclude that the integration clauses did not apply for more fundamental reasons, which would exist even if *all* of the integration clauses had referred to "the parties."

A. *Additional Factual Background*.

Around November 2000, Dendy asked Norris for a loan of $125,000. He explained that "he had a temporary bind"; beyond that, Norris did not know what it was for.

Dendy told Norris to "just add it on." Norris understood this to mean that the loan was to be repaid when the Advances were repaid. He also understood it to mean that, like the Advances, the loan would bear ten percent interest. Finally, he understood it to mean that "[the Dendy Company] would repay" the loan. The loan terms were never put in writing.

On November 3, 2000, Norris gave Dendy a check, drawn on the Norris Company's account and payable to "Bill Dendy," for $125,000. The loan was never repaid.

B. *The Trial Court's Ruling*.

The trial court ruled that the $125,000 was a personal loan to Dendy.

It also found that the statute of limitations on this loan had not run. It explained: "Dendy promised to repay Norris at the time they settled their accounts on the Development Agreement. The Development was not completed before Dendy's death. No accounting occurred during Dendy's life. The accounting has just been completed."

Finally, it found that Dendy and the Dendy Company were "jointly and severally liable" for the loan, essentially on an alter ego theory. It explained: "The [Original] Agreement was informal and the handling of finances was equally informal. This loan arrangement is but one example of the manner in which Dendy conducted his business and personal affairs. Dendy was the decision maker for all his business entities. Until his death the limited partners had no involvement. Assets and debts were commingled among all of the entities. It was not uncommon for . . . Dendy to divert funds belonging to one account into various unrelated accounts. As further indicia of the unity of interest and ownership all the business entities were located and operated in the same building which was owned by Dendy."

It therefore awarded the Norris Company $125,000, plus interest at ten percent, against the Dendy Company.

C. *The Dendy Company's Liability*.

The Dendy Company argues that the trial court erred by awarding the amount of the loan against the Dendy Company, because the debtor was Dendy personally, not the Dendy Company.

The Norris Company complains bitterly that Dendy — the general partner in the Dendy Company — promised that the Dendy Company would repay the loan. As the Dendy Parties point out, however, this was an oral promise that the Dendy Company would answer for a debt of Dendy and, as such, unenforceable under the statute of frauds. (Civ. Code, §§ 1624, subd. (b), 2793, 2794; *Harris v. Frank* (1889) 81 Cal. 280, 288.) The Norris Company does not dispute this.[31]

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[31] Arguably, the application of the statute of frauds presented a factual question as to whether the Dendy Company or Dendy was the principal debtor. (See Civ. Code, § 2794, subd. (2).) If so, we must assume the trial court implicitly found that

“““Ordinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors. Under the alter ego doctrine, however, where a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation’s acts as if they were done by the persons actually controlling the corporation . . . .” [Citation.]’ [Citation.]” (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1106-1107.)

“A court may also disregard the corporate form in order to hold one corporation liable for the debts of another affiliated corporation when the latter ‘“‘is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation.”’’ [Citation.]” (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.*, *supra*, 217 Cal.App.4th at p. 1107.)

Using the alter ego doctrine is commonly called “piercing the corporate veil.” (E.g., *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.*, *supra*, 217 Cal.App.4th at p. 1108.)

Ordinarily, the alter ego doctrine does not apply to partnerships. In the case of a general partnership, it is unnecessary to pierce the corporate veil; each partner is already

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[footnote continued from previous page]
Dendy was the principal debtor, and therefore that the statute did apply, as it held the Dendy Company liable exclusively on an alter ego theory and not as the debtor.

liable for the obligations of the partnership. (Corp. Code, § 16306, subd. (a).) For the same reason, in the case of a limited partnership, it is unnecessary to pierce the corporate veil to get at the assets of a general partner. (Corp. Code, § 15904.04, subd. (a).) And a limited partner typically has insufficient control of the partnership to support piercing the corporate veil. (Corp. Code, § 15903.02.)

In this case, however, the trial court used so-called "reverse piercing." "Whereas traditional piercing holds an individual liable for the acts of a corporation, or a parent liable for the acts of a subsidiary, reverse piercing imposes liability on a corporation for the obligations of an individual shareholder, or on a subsidiary corporation for the acts of a parent corporation." (Allen, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice* (2011) 85 St. John's L. Rev. 1147, 1153.) If reverse piercing is permissible at all, it would seem just as applicable to a partnership as to a corporation.

As we will discuss, however, *Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510 (*PIP*) "reject[ed]" reverse piercing (*id*. at p. 1517; see also *id*. at p. 1513), because the doctrine had "inherent and insurmountable flaws." (*Id*. at p. 1524.) Thus, it held that "a third party creditor may not pierce the corporate veil to reach corporate assets to satisfy a shareholder's personal liability." (*Id*. at pp. 1512-1513.)

The court observed that "[w]hether to accept or reject the doctrine is an issue of first impression in this state." (*Postal Instant Press, Inc. v. Kaswa Corp., supra*, 162 Cal.App.4th at p. 1518.) It then explained:

“Traditional [piercing] and reverse piercing, while having similar goals, advance those goals by addressing very different concerns. When a judgment debtor is a corporation, the judgment creditor cannot reach the assets of the individual shareholders due to limitations on liability imposed by corporate law. Traditional piercing of the corporate veil is justified as an equitable remedy when the shareholders have abused the corporate form to evade individual liability, circumvent a statute, or accomplish a wrongful purpose. [Citations.]

“The same abuse of the corporate form does not exist when the judgment debtor is the shareholder. In that situation, the corporate form is not being used to evade a shareholder’s personal liability, because the shareholder did not incur the debt through the corporate guise and misuse that guise to escape personal liability for the debt. The judgment creditor can enforce the judgment against the shareholder’s assets, including shares in the corporation. Upon acquiring the shares, the judgment creditor will have whatever rights the shareholder had in the corporation.

“The true issue that outside reverse piercing seeks to address is not the misuse of the corporate form to shield the shareholder from personal liability. Rather, the issue addressed by outside reverse piercing is the shareholder’s transfer of personal assets to the corporation to shield the assets from collection by a creditor of the shareholder. In other words, outside reverse piercing seeks to protect the judgment creditor from the shareholder’s fraudulent transfer of assets to the corporation. But . . . conversion and fraudulent conveyance already afford judgment creditors protection in that situation.”

(*Postal Instant Press, Inc. v. Kaswa Corp.*, *supra*, 162 Cal.App.4th at pp. 1522-1523.) The court also mentioned that reverse piercing could harm "innocent shareholders and corporate creditors." (*Id*. at p. 1513; see also *id*. at pp. 1523-1524.)

On the other hand, in *Curci Investments, LLC v. Baldwin* (2017) 14 Cal.App.5th 214 (*Curci*), a different panel of the same court held that reverse piercing was at least potentially available on the facts of the case before it. (*Id*. at p. 224.) It distinguished *PIP*, essentially on two grounds. First, it noted that *PIP* involved a corporation, whereas *Curci* involved a limited liability corporation (LLC). (*Id*. at p. 222.) A creditor can execute on a debtor's stock in a corporation but can only obtain a charging order against a debtor's interest in an LLC; the latter leaves the debtor in control of the LLC and able to prevent it from making any distributions.[32] (*Id*. at p. 223.) Second, there were no "innocent" shareholders in the LLC. The judgment debtor owned 99 percent of the LLC; his wife owned the other one percent, but her share was community property, and therefore it could be used to satisfy the judgment against him. (*Id*. at pp. 222-223.) The court did indicate, however, that on remand, the creditor would have to "demonstrate the absence of a plain, speedy, and adequate remedy at law" before reverse piercing would be allowed. (*Id*. at pp. 223-224.)

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[32] Significantly, the individual debtor in *Curci* was doing exactly this. Between 2006 and 2012, his LLC had distributed approximately $178 million to him and his wife. After 2012, however, when the creditor obtained a judgment against him, the LLC distributed zero — because the debtor extended (without any new consideration) the due date of loans that the LLC had made to his family members. (*Id*. at pp. 218-219.)

If we were to follow *PIP*, we would conclude that the trial court erred. It seems clear that *PIP* rejected reverse piercing under any circumstances. However, even if we were to follow *Curci*, we would still conclude that the trial court erred. Here, unlike in *Curci*, there *were* innocent limited partners in the Dendy Company — Tami Roick (20 percent), Greg Dendy (20 percent), and a Dendy family trust (55 percent).

We therefore conclude that the trial court erred by requiring the Dendy Company to repay the loan. Because we would reverse the award on this ground, we do not discuss the Dendy Company's alternative statute of limitations argument.

XII

STANDING OF THE DENDY PARTIES

All of the Dendy Parties filed a notice of appeal. Of them, however, only the Dendy Company and the LLC were actually aggrieved by the judgment. (See Code Civ. Proc., § 902.) Moreover, the issues raised in the Dendy Parties' opening brief as cross-appellants affect only the Dendy Company. (See parts X & XI, *ante*.) We conclude that, other than the Dendy Company, all of the Dendy Parties have abandoned their cross-appeal. Accordingly, to the extent that the cross-appeal was taken by the LLC, Dendy Real Estate, Mrs. Dendy, Kelli Jones, James Roick, and Dr. Williams, we would dismiss it in any event. (They would remain respondents in the appeal.)

XIII

DISPOSITION

Based on the parties' requests for dismissal, the appeal and the cross-appeal are dismissed. In the interest of justice, all parties shall bear their own costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.